

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendment to the Commission's Rules
Regarding a Plan for Sharing
the Costs of Microwave Relocation

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WT Docket No. 95-157
RM-8643

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COMMENTS OF TENNECO ENERGY

Julian L. Shepard
Thomas J. Keller

VERNER, LIIPFERT, BERNHARD
McPHERSON & HAND, CHARTERED
901 15th Street, N.W.
Washington, D.C. 20005
(202) 371-6111

Its Attorneys

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SUMMARY

Tenneco Energy ("Tenneco") operates an interconnected system of private operational fixed microwave facilities in the 2 GHz band in support of its 19,000 mile interstate natural gas pipeline operation. This system provides essential voice and data communications for the safety and effectiveness of the pipeline operation, and consists of more than 100 interconnected microwave links spanning vast geographic distances from Houston, Texas to Buffalo, New York. The great majority of these links operate in the 2 GHz band.

Tenneco faces considerable uncertainty as an incumbent microwave licensee under the Commission's transition plan. First, Tenneco has no assurance under the plan that PCS entities will meet Tenneco's need to maintain the safety of the pipeline operation. This requires both continuity of operations and compatibility of the equipment used throughout its microwave system. Second, as Tenneco's microwave system traverses remote portions of several PCS service areas, Tenneco has no assurance that some PCS entities will not take a "wait-and-see" approach to the FCC's band clearing plan -- leaving the areas affected by Tenneco's system until the very end of their PCS systems build-outs. Third, Tenneco has no assurance that the standard of comparability applied to its system under the involuntary relocation provisions of the plan will be fair and adequately meet its needs.

Essentially, Tenneco requires a system-wide approach to relocation of its system. Unless Tenneco can assemble a consolidated negotiation with a critical mass of affected PCS entities bargaining in good faith to provide an appropriate system-wide replacement, and the PCS entities can then agree to a sharing of costs, and they have sufficient assurances of reimbursement by subsequent licensees, Tenneco likely faces piecemeal negotiations leading to a less-than-total system relocation that will jeopardize pipeline safety. Accordingly, Tenneco supports one of the Commission's basic goals in this proceeding -- ensuring reimbursement to the initial PCS entities that pay the costs of relocating incumbent microwave licensees that would interfere with subsequent PCS entities who thereby would benefit from the relocation. However, many of the specific proposals in the Notice will promote an inadequate, piecemeal approach to relocation of a system of the importance, size, and complexity of Tenneco's, and will therefore jeopardize public safety and be contrary to the public interest.

Tenneco encourages the Commission to create incentives for PCS licensees to work collectively and cooperatively to fulfill their band-clearing obligations. In this regard: (1) "comparability" should be carefully defined to permit Tenneco and other incumbent licensees to be made whole by PCS licensees -- the transition to another band should permit analog equipment to be replaced with digital equipment and should not cost the incumbent licensees anything other than the inconvenience; (2)

reimbursement rules should not include arbitrary caps based on hypothetical averages and should be based on reliable data; and (3) the Commission should not adopt a date certain on which incumbent microwave licensees will lose their interference protection in the 2 GHz band.

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COMMENTS OF TENNECO ENERGY

Tenneco Energy ("Tenneco"), by its attorneys, hereby submits comments in response to the Notice of Proposed Rule Making ("Notice")^{1/} in the above-captioned proceeding.^{2/} Tenneco operates an interconnected system of private operational fixed microwave facilities in the 2 GHz band, and has a direct and pecuniary interest in the subjects of this proceeding.^{3/} As the Commission considers the proposals in the Notice, it must carefully balance the need to provide adequate certainty to initial PCS entities regarding the sharing and allocation band-clearing relocation costs, with the need to maintain fundamental fairness to all the incumbent licensees that face the inconvenience, potential disruption of operations, and costs associated with this band-clearing initiative. In this regard,

^{1/} Notice of Propose Rule Making, WT Docket No. 95-426, RM-8643, FCC 95-426, 60 Fed. Reg. 55529 (November 1, 1995).

^{2/} Tenneco is a member of the American Petroleum Institute ("API") and the American Gas Association ("AGA") and generally supports their comments in this proceeding.

^{3/} Tenneco Communications Corporation, a wholly-owned subsidiary of Tenneco's parent corporation, is the licensee of record.

the inevitable relocation of Tenneco's microwave facilities required by the Commission's rules creates a monumental challenge for Tenneco as it must maintain the on-going essential public safety functions of its large, multi-state microwave system which support its interstate natural gas pipeline operation, one of the largest in the United States.

Tenneco supports one of the Commission's basic goals in this proceeding -- ensuring reimbursement to the initial PCS entities that pay the costs of relocating incumbent microwave licensees that would interfere with subsequent PCS entities who thereby would benefit from the relocation. However, as explained below, Tenneco questions the need for some of the detailed proposals and advocates policies for the Commission's relocation plan that will facilitate, not impede, the expeditious system-wide relocation of Tenneco's facilities -- a relocation that must not disrupt or impair the system's essential public safety functions. Unfortunately, several of the specific proposals in the Notice will promote an inadequate, piecemeal approach to relocation of a system of the importance, size, and complexity of Tenneco's, and will therefore jeopardize public safety and be contrary to the public interest.

At the outset, it should be noted that Tenneco has not sought, and will not seek, unreasonable compensation or concessions from any PCS entity in exchange for the relocation of its microwave system. Simply stated, Tenneco seeks just, fair and reasonable compensation. Accordingly, Tenneco has not raced

to the negotiation table with excessive demands. Indeed, the occasion of this mandatory relinquishment of the 2 GHz frequencies has forced Tenneco first to evaluate its current and future needs for the microwave system in the context of its enterprise-wide telecommunications planning. During this process, Tenneco has communicated with several PCS licensees, as Tenneco is giving due consideration to all possible options for meeting its current and future communications needs, including terrestrial microwave, satellite, and wire-based alternatives. These activities are time-consuming, and, in a firm the size of Tenneco, require the participation and collaboration of multiple units within the organization. Nevertheless, these activities are an essential first-step toward meaningful voluntary negotiations.

I. TENNECO'S MICROWAVE SYSTEM PROVIDES ESSENTIAL PUBLIC SAFETY COMMUNICATIONS FOR ONE OF THE NATION'S LARGEST INTERSTATE NATURAL GAS PIPELINES THAT SPANS 19,000 MILES

Tenneco has integrated operations that include the transportation or sale of about one-sixth of all natural gas consumed in the United States. Tenneco, based in Houston, Texas, also ranks among the largest natural gas marketers, accounting for about five percent of total domestic sales. As part of its core business, Tenneco operates an extensive interstate pipeline network spanning more than 19,000 miles which constitutes one of the largest single gas transmission system in the United States. This pipeline provides 3.3 trillion cubic feet of natural gas

annually to end users in 26 states, home to nearly 70 percent of all residents in the U.S.

Pipeline safety is a subject of extensive Federal law and regulation.^{4/} Recently, the gas industry called for an increased emphasis on pipeline safety, and in response, the Gas Research Institute ("GRI"), a nonprofit organization that sponsors research and development and demonstration activities ("RD&D") in the field of natural gas and manufactured gas,^{5/} is pursuing a three-part strategy related to pipeline safety including: (1) pipeline inspection; (2) pipeline integrity; and (3) pipeline monitoring. These efforts are being carried out in coordination with the Interstate Natural Gas Association of America (INGAA), the Pipeline Research Committee (PRC), the American Petroleum Institute (API), and the Department of Transportation (DOT) Office of Pipeline Safety.^{6/} Tenneco supports these efforts, and is committed to maintaining the

^{4/} See Natural Gas Pipeline Safety Act of 1978, 49 U.S.C. § 1671 et seq. See also the pipeline safety regulations adopted by the Department of Transportation, 49 C.F.R. Parts 191 and 192 (1990).

^{5/} GRI must apply to the Federal Energy Regulatory Commission (F.E.R.C.) for advance approval of its RD&D program and five-year RD&D plan pursuant to 18 C.F.R. § 154.38(d)(5)(ii) and (iii) (1994). Interstate pipeline companies that are members of GRI must receive F.E.R.C. authority to recover through their rates their portion of the costs of GRI's annual RD&D program. 18 C.F.R. § 154.38(d)(5)(iv) (1994).

^{6/} See Opinion and Order Approving Gas Research Institute's Second Year 1995-1996 Research, Development and Demonstration Program, Related Five-Year Research and Development Plan for 1996-2000, and Funding for 1996 RD&D Activities, 73 F.E.R.C. P61,073 (October 13, 1995).

highest levels of safety throughout its interstate pipeline operations.

The safe operation of Tenneco's interstate pipeline network depends upon the continued availability of an appropriate, high-quality, private communications system. The current microwave system provides essential voice and data communications between remote areas of the natural gas pipeline, the pipeline control center at Hockley, Texas, and various remote, decentralized control points. In times of high throughput, disaster, or emergency, the safety and effectiveness of the pipeline operation is dependent on the communications capabilities of this system. In the event of a pipeline emergency, Tenneco's ability to act responsibly and to mitigate any potential damages depends on the speed at which it can determine the affected locations along the pipeline and direct a response by its personnel at various locations.

Therefore, any significant disruption of the microwave system or reduction in its capabilities during the operation of the pipeline would potentially create significant risks of injury to life and property. Accordingly, Tenneco must ensure the continued safe operation of its interstate microwave system throughout the FCC's mandated transition in the frequencies used for microwave communications. The policies and rules adopted in this proceeding, should take account of these needs.

II. TENNECO FACES UNIQUE CHALLENGES TO ACHIEVE A SMOOTH AND ORDERLY SYSTEM-WIDE RELOCATION UNDER THE COMMISSION'S RELOCATION PLAN

The Tenneco microwave system consists of more than 100 interconnected microwave links spanning vast geographic distances from Houston, Texas to Buffalo, New York. The great majority of these links operate in the 2 GHz band. The microwave system affects 12 major trading areas and 51 basic trading areas -- implicating eight current PCS licensees. Moreover, because Tenneco's system utilizes frequencies allocated for future use by unlicensed PCS devices, the relocation of the Tenneco microwave system will involve negotiations with both licensed and unlicensed PCS entities.^{7/}

As an incumbent licensee, Tenneco faces considerable uncertainty under the Commission's transition plan.^{8/} First, Tenneco has no assurance under the plan that PCS entities will meet Tenneco's need to maintain the safety of the pipeline operation. This requires both continuity of operations and compatibility of the equipment used throughout its microwave system. Second, as Tenneco's microwave system traverses remote

^{7/} Tenneco remains concerned that some PCS entities may not comply with the recommendations of Working Group 20 of the National Spectrum Managers' Assn. requiring advance notification and disclosure of technical information to permit incumbent licensees to conduct their own technical interference analyses.

^{8/} Not only have there been uncertainties inherent in the Commission's transition plan, but PCS entities have sought legislation to eviscerate the provisions of current FCC rules for voluntary negotiations, during the voluntary period.

portions of several PCS service areas, Tenneco has no assurance that some PCS entities will not take a "wait-and-see" approach to the FCC's band clearing plan -- leaving the areas affected by Tenneco's system until the very end of their PCS systems build-outs.^{9/} Third, Tenneco has no assurance that the standard of comparability applied to its system under the involuntary relocation provisions of the plan will be fair and adequately meet its needs.

In addition to these uncertainties, the Notice proposes to "clarify" the term "good faith" applicable to the mandatory negotiation period in a manner that is unreasonable.^{10/} Specifically, the Notice tentatively concludes that a PCS licensee's offer to replace an incumbent's existing system with "comparable facilities" (as also clarified in the Notice) would constitute a "good faith" offer and, by contrast, an incumbent's failure to accept such an offer would create a rebuttable presumption that the incumbent microwave licensee is acting in bad faith. This standard of "good faith" is unfairly slanted in favor of PCS licensees.

^{9/} PCS operations will interfere with Tenneco's microwave system in both densely populated urban areas and less urbanized areas. However, much of Tenneco's microwave system will affect rural portions of PCS service areas. It is quite conceivable that only some of the affected PCS licensees may view the relocation of Tenneco's facilities as a priority during the initial deployment of PCS hardware.

^{10/} Id. at ¶69.

While Tenneco supports the notion that an offer of comparable facilities should constitute "good faith" on the part of a PCS licensee, Tenneco submits that a counter-proposal by the incumbent microwave licensee requiring improvements in the initial offer should not constitute a rebuttable presumption of "bad faith." Only a complete refusal to bargain should constitute "bad faith." Moreover, to achieve even-handed treatment in the rules, the "good faith" standard should be applied by the Commission on a bilateral basis, e.g., if Tenneco makes an initial offer or a counter-offer, the PCS entity must respond and be bound to the same standard of "good faith."

The Notice also solicits comment on the view that "the time for expansive negotiation is during the voluntary period and that, by the time the parties have reached the mandatory negotiation period, only the bare essentials should be required."^{11/} In light of the complex challenges Tenneco and other incumbents face to achieve a system-wide relocation, the Commission's rules should not restrict the scope of negotiations during the mandatory period. The primary goal of the rules should be to encourage a rapid clearing of the band, and placing additional constraints on the freedom of the parties to bargain would only frustrate that goal.

These uncertainties, potentially indefinite delays, and inequities may result in outcomes under the transition plan detrimental to the continued maintenance of safety on Tenneco's

^{11/} Notice at ¶ 69.

pipeline operations. In sum, unless Tenneco can assemble a consolidated negotiation with a critical mass of affected PCS entities bargaining in good faith to provide an appropriate system-wide replacement, and the PCS entities can then agree to a sharing of costs, and they have sufficient assurances of reimbursement by subsequent licensees, Tenneco likely faces piecemeal negotiations leading to a less-than-total system relocation that will jeopardize pipeline safety. The voluntary joint-agreement for cost sharing among five of the largest PCS licensees recently submitted to the Commission on an ex parte basis in this proceeding is a good example of the type of necessary cooperation among licensees that the Commission's rules and policies should encourage.^{12/}

**III. THE STANDARD OF "COMPARABILITY" SHOULD ENSURE THAT
INCUMBENTS ARE OFFERED FACILITIES THAT ARE CONSISTENT
WITH CURRENT STATE OF COMMUNICATIONS TECHNOLOGY**

Tenneco supports the Commission's recognition that the current negotiation process is the most appropriate means for determining comparability of the existing and replacement facilities.^{13/} However, Tenneco disagrees with the proposals in the Notice that would unfairly define "comparability" to limit severely the quality of replacement systems available to Tenneco

^{12/} See Public Notice 60727, Ex Parte Presentations and Post-Reply Comment Period Filings in Non-Restricted Proceedings, Nov. 28, 1995; submissions of AT&T, et al., and GTE, et al.

^{13/} Notice at ¶ 72.

and other incumbent licensees. Purely as a matter of equity, the Commission's relocation plan should ensure that incumbent licensees are made whole, and the proposals in the Notice fail to provide such assurances.^{14/}

In order to be made whole, Tenneco requires a seamless relocation of its entire system to another band utilizing suitable equipment of the type it would purchase today if it were voluntarily in the market for new equipment. At the time Tenneco acquired the various components of its current microwave system, as pipeline safety was at issue, Tenneco selected technology that was then state-of-the-art. The equipment that is used to replace Tenneco's current system should be of comparable quality -- measured by today's marketplace standards.

The replacement of microwave communications equipment should be treated no differently than the replacement of other types of business equipment such as telephones. For example, if a business owner is entitled to the replacement of a telephone system that was purchased years ago when rotary phones were considered state-of-the-art, it would be completely unreasonable to require that equipment to be replaced today with rotary (pulse dial) equipment. Technology has advanced. The touch-tone phone

^{14/} In addition to the other issues discussed below, the Notice attempts to cut back on various categories of reimbursable expenses associated with the relocation of incumbents, including legal fees and the consultant fees necessary to evaluate the current microwave system. Notice at ¶¶ 37, 78. Tenneco opposes these proposals as being fundamentally at odds with the concept of making incumbents "whole."

is today what the rotary phone was then, and it would be quite reasonable to replace the rotary phone equipment with current technology. This type of replacement would not be a "premium." Indeed, communications technology is constantly advancing, and there are many sophisticated enhancements that go beyond mere touch-tone capability -- or digital transmission capability -- such enhancements more appropriately might fall into the category of "premium."

The Notice incorrectly assumes that there are "acceptable analog solutions" available for replacement of an incumbent's microwave system.^{15/} At the time Tenneco purchased most of its microwave equipment, only analog transmission capability was available. Nevertheless, Tenneco purchased state-of-the-art equipment at that time. Today, digital equipment is the equivalent of what Tenneco originally purchased. Digital equipment is widely available, and analog equipment is being phased-out by manufacturers. Moreover, analog equipment purchased today will not likely be supported by manufacturers for the duration of its use -- such equipment is the antiquated "rotary-dial generation" of today's microwave technology.

If comparability is to be defined in an unreasonably restrictive manner -- to include only analog equipment to replace analog equipment -- the Commission will be adopting a policy that is antithetical to long-established policies favoring the

^{15/} Notice at ¶ 77.

deployment of spectrum-efficient technology.^{16/} The frequency bands that have been proposed for future occupancy by 2 GHz incumbents are congested. These bands will continue to be congested, and become even more congested in the future. Digital transmission technology can provide much needed relief, and accommodate the growth in traffic that many incumbent users will experience.

IV. THE REIMBURSEMENT RULES SHOULD NOT SET ARBITRARY LIMITS ON THE RELOCATION COSTS SUBJECT TO REIMBURSEMENT

The Notice proposes a cap on the amount subject to reimbursement equal to \$250,000 per link, plus \$150,000 if a tower is required.^{17/} These figures are based on information contained in an OET publication written more than four years ago. When closely examined, this information apparently was gathered informally by word-of-mouth contacts with a handful of trade associations and manufacturers.^{18/} Certainly, this is not an adequate basis upon which to base the cap.

^{16/} Digital technology was one of the driving forces behind the emerging technologies rule making, and is a bedrock of U.S. spectrum management policy. See First Report and Order and Third Notice of Proposed Rule Making, ET Docket No. 92-9, FCC 92-437, released October 16, 1992, ¶ 2; See also U.S. Spectrum Management Policy: Agenda for the Future; U.S. Department of Commerce, NTIA Special Publication 91-23, pp. 144-148 (Feb. 1991).

^{17/} Notice at ¶¶ 40-43.

^{18/} Creating New Technology Bands for Emerging Telecommunications Technology, FCC Office of Engineering and Technology, OET/TS 92-1 (Jan. 1992), note 47.

There is good reason to question the need for a regulatory cap on the total amount to be reimbursed per link. Indeed, the recent ex parte submission of a privately negotiated reimbursement agreement among five of the largest PCS licensees does not contain any cap on a per link basis, or otherwise.^{19/} The agreement states that the costs to be reimbursed must be documented and justified in a manner set forth in the agreement.^{20/} A PCS licensee that relocates an incumbent microwave user is entitled to reimbursement for "all payments actually made . . . which represent a direct cost of relocating the incumbent's microwave link(s) . . ." including but not limited to certain itemized costs set forth in an exhibit to the agreement.^{21/} A similar approach could be taken with the issue of free-rider reimbursement -- with a requirement that costs be documented by initial PCS licensees in an appropriate manner.

In any event, if the limit for reimbursement available to a PCS entity for providing comparable facilities is arbitrarily set too low, either the PCS entity will have to absorb the difference between the actual costs and the arbitrary ceiling, or the PCS entity will be inclined to offer an inadequate system to the incumbent as a replacement. In both of these cases, the outcome

^{19/} See Agreement between AT&T Wireless Service, Inc., Wireless Co., L.P., PhillieCo, PCS PrimeCo, and GTE Macro Communications Service Corporation (Sept. 28, 1995), referenced in FCC Public Notice 60727, (Nov. 28, 1995).

^{20/} Id. at ¶ 7.

^{21/} Id. at ¶ 4.

is undesirable and not in the public interest. At a minimum, the reimbursement rules should be carefully crafted to ensure that there are no arbitrary caps, and, if a cap is to be adopted, it should be applied relative to the specific type of use and equipment configuration required for an appropriate and fair relocation -- not based on hypothetical averages.^{22/}

V. THE PROPOSED 2005 DATE FOR MAKING INCUMBENTS SECONDARY IN THE 2 GHz BAND WOULD FRUSTRATE THE COMMISSION'S BASIC GOAL OF ENCOURAGING RAPID CLEARING OF THE BAND

The Notice proposes to make microwave incumbents that are still operating in the 1850 to 1990 MHz band "secondary" as of April 4, 2005.^{23/} This proposal would deprive incumbents of their interference protection and create incentives for PCS licensees to postpone indefinitely, where possible -- for microwave links located in rural or less urbanized areas -- the making of any offer for relocation. This proposal is hostile to interests of incumbent licensees such as Tenneco that seek expeditious system-wide relocations, and would permit PCS licensees to frustrate the Commission's band-clearing goal. However, assuming arguendo that the Commission decides to adopt a date-certain approach, it should adopt a companion requirement that, in advance, all incumbent 2 GHz microwave licensees must

^{22/} Before any cap is finally adopted, Tenneco encourages the Commission to provide additional public notice and the opportunity for public comment.

^{23/} Notice at ¶90.

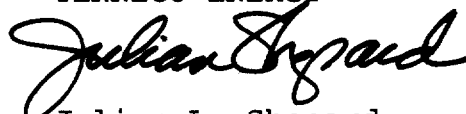
receive firm offers from PCS entities for suitable facilities in another band.

VI. CONCLUSION

For the reasons set forth above, Tenneco urges the Commission to refrain from adopting policies and rules for the relocation plan that will promote inadequate, piecemeal relocation offers from PCS licensees. Tenneco encourages the Commission to create incentives for PCS licensees to work collectively and cooperatively to fulfill their band-clearing obligations. In this regard: (1) "comparability" should be carefully defined to permit Tenneco and other incumbent licensees to be made whole by PCS licensees -- the transition to another band should not cost the incumbent licensees anything other than the inconvenience; (2) reimbursement rules should not include arbitrary caps based on hypothetical averages and should be based on reliable data; (3) the Commission should not adopt a date certain on which incumbent microwave licensees will lose their interference protection in the 2 GHz band.

Respectfully submitted,

TENNECO ENERGY



Julian L. Shepard
Thomas J. Keller
Its Attorneys

VERNER, LIIPFERT, BERNHARD
MCPHERSON & HAND, CHARTERED
Suite 700
901 15th Street, N.W.
Washington, D.C. 20005-2301

November 30, 1995

CERTIFICATE OF SERVICE

I, Bridget Y. Monroe, a secretary with the law firm of Verner, Liipfert, Bernhard, McPherson and Hand, hereby certify that on this 30th day of November, 1995, a copy of Comments of Tenneco Energy was mailed, first class postage prepaid to the following:

Commissioner Reed E. Hundt
Federal Communications Comm.
1919 M Street, NW -- Room 814
Washington, D.C. 20554

Commissioner James H. Quello
Federal Communications Comm.
1919 M Street, NW -- Room 802
Washington, D.C. 20554

Commissioner Andrew D. Barrett
Federal Communications Comm.
1919 M Street, NW -- Room 826
Washington, D.C. 20554

Commissioner Rachelle B. Chong
Federal Communications Comm.
1919 M Street, NW -- Room 844
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Comm.
1919 M Street, NW -- Room 832
Washington, D.C. 20554

Michelle Farquhar
Chief, Wireless Telecommunica-
tions Bureau
Federal Communications Comm.
2025 M Street, NW -- Room 5002
Washington, D.C. 20554

Mr. Ralph A. Haller
Deputy Chief, Wireless
Telecommunications Bureau
Federal Communications Comm.
2025 M Street, NW -- Room 5002
Washington, D.C. 20554

Mr. Gerald P. Vaughan
Deputy Chief, Wireless
Telecommunications Bureau
Federal Communications Comm.
2025 M Street, NW -- Room 5002
Washington, D.C. 20554

Mr. Bruce A. Franca
Deputy Chief, Office of
Engineering & Technology
Federal Communications Comm.
2000 M Street, NW -- Room 7002
Washington, D.C. 20554

Mr. Fred Thomas
Electronics Engineer
Office of Engineering &
Technology
Federal Communications Comm.
2000 M Street, NW -- Room 480
Washington, D.C. 20554

John Cimko, Jr., Esq.
Chief, Policy Division
Wireless Telecommunications
Bureau
Federal Communications Comm.
1919 M Street, NW -- Room 644
Washington, D.C. 20554

Rosalind K. Allen, Esq.
Acting Chief, Commercial
Wireless Division
Federal Communications Comm.
2025 M Street, NW -- Room 5202
Washington, D.C. 20554

Mr. Robert H. McNamara
Chief, Private Radio Division
Wireless Telecommunications
Bureau
Federal Communications Comm.
2025 M Street, NW -- Room 5322
Washington, D.C. 20554

Michael Wack, Esq.
Deputy Chief, Policy Division
Wireless Telecommunications
Bureau
Federal Communications Comm.
1919 M Street, NW -- Room 644
Washington, D.C. 20554

David Furth, Esq.
Deputy Chief, Commercial
Wireless Division
Federal Communications Comm.
2025 M Street, NW -- Room 5202
Washington, D.C. 20554

Mr. Edward Jacobs
Deputy Chief, Commercial
Wireless Division
Federal Communications Comm.
2025 M Street, NW -- Room 5202
Washington, D.C. 20554

Lawrence D. Atlas, Esquire
Associate Bureau Chief
Wireless Telecommunications
Bureau
2025 M Street, NW --Room 5002E
Washington, D.C. 20554

Jacqueline Chorney, Esquire
Legal Assistant
Office of Plans & Policy
Federal Communications Comm.
1919 M Street, NW -- Room 838G
Washington, D.C. 20554

Gregory Rosston
Office of Plans & Policy
Federal Communications Comm.
1919 M Street, NW -- Room 822
Washington, D.C. 20554


Bridget Y. Monroe